[2003–04 Gib LR 421]

WAHNON v. ATTORNEY-GENERAL

SUPREME COURT (Pizzarello, Ag. C.J.): March 18th, 2004

Criminal Procedure—charges—multiple charges—multiple charges arising out of same incident—assaulting police officer and assault occasioning actual bodily harm involve different elements, with actual bodily harm normally more serious—if charged alternatively, should convict of more serious and dismiss other—if charged cumulatively, may convict on both in appropriate circumstances

The appellant was charged in the alternative in the magistrates' court with assault occasioning actual bodily harm, contrary to s.94 of the Criminal Offences Ordinance; assault of a police officer, contrary to s.89; and resisting a police officer in the execution of his duty, contrary to s.89.

The appellant pleaded guilty to the third charge, but not guilty to the first two charges. The Stipendiary Magistrate convicted him on both the first two charges, sentencing him to 10 weeks' imprisonment for the assault of a police officer, with no separate penalty for the assault occasioning actual bodily harm.

On appeal against the conviction for assault occasioning actual bodily harm, the appellant submitted that (a) the elements of the two charges were the same except that assault on a police officer required the added element that he should have been "in the execution of his duty," and since the Stipendiary found that that was the case, the charge of assault occasioning actual bodily harm was subsumed within the more important charge of assault of a police officer; and (b) as the two charges were laid in the alternative, the Stipendiary fell into error when he convicted on both—he should have acquitted on the lesser charge, which he determined to be that of assault occasioning actual bodily harm.

The Crown submitted that as the charges were laid and preferred in the alternative, with assault on a police officer as the main charge, it was not open to the Stipendiary to convict on both.

Held, allowing the appeal:

The conviction of assault occasioning actual bodily harm would be quashed because the charges were preferred in the alternative—as being for totally different offences—and the Stipendiary should therefore have convicted on one and dismissed the other. Having made it clear that he thought the charge of assault on a police officer was the more serious in the circumstances, it was the charge of assault occasioning actual bodily

harm which should have been dismissed. It was not the case, however, that assault occasioning actual bodily harm could be subsumed under assault of a police officer as the two offences involved different elements and in any case assault occasioning actual bodily harm was ordinarily regarded as the more serious of the two offences. Had the charges not been laid in the alternative, a conviction on both would have been possible (paras. 7–9).

Cases cited:
(1) *Lawrence* v. *Same*, [1968] 1 All E.R. 1191; [1968] 2 Q.B. 93; (1968), 132 J.P. 277; 112 Sol. Jo. 212, considered.
(2) *R.* v. *Harris*, [1969] 1 W.L.R. 745; [1969] 2 All E.R. 599n; (1969), 133 J.P. 442; 113 Sol. Jo. 363, followed.

Legislation construed:
Criminal Offences Ordinance (1984 Edition), s.89:

> "(1) A person who assaults, obstructs, or resists any police officer in the execution of his duty or aids or incites any other person to assault, obstruct or resist any police officer or any person aiding or assisting a police officer in the execution of his duty, is guilty of an offence and liable on summary conviction to imprisonment for six months and to a fine at level 4 on the standard scale."

s.94: "A person who commits an assault occasioning actual bodily harm is guilty of an offence and is liable on conviction on indictment to imprisonment for five years."

M. Turnock for the appellant;
Miss K. Khubchand, Crown Counsel, for the respondent.

1 **PIZZARELLO, Ag. C.J.:** In this case the appellant was charged with three offences, namely:

(a) assault occasioning actual bodily harm, contrary to s.94 of the Criminal Offences Ordinance.

(b) assault of a police officer, contrary to s.89 of the Criminal Offences Ordinance.

(c) resisting a police officer in the execution of his duty, contrary to s.89 of the Criminal Offences Ordinance.

The appellant pleaded not guilty to (a) and (b), and guilty to (c).

2 The trial of both charges were taken together, I assume with the consent of the appellant. The facts in relation to both (a) and (b) were sufficiently closely connected as to warrant that course and indeed Miss Khubchand, who appeared for the prosecution in the magistrates' court, informs me that the charges were laid in the alternative and that she reminded the learned Stipendiary Magistrate that the charges were preferred in the alternative when he convicted on both.

3 Mr. Turnock submits that the Stipendiary Magistrate fell into error when he convicted the appellant on both charges. The elements required of the two charges were the same, save that assault on a police officer required the added element that he should have been "in the execution of his duty," which the Stipendiary found to be the case (in respect of which finding there is no appeal). In that event, the charge of assault occasioning actual bodily harm is subsumed under the more important and full charge of assault on a police officer. The two charges are laid in the alternative to allow for the situation where the prosecution does not make out the extra element that the police officer was in "execution of his duty," as otherwise the magistrates' court would have no power to find an accused guilty of a lesser offence. He refers to *Lawrence* v. *Same* (1). The Stipendiary Magistrate made it plain that the charge of assault on a police officer was the more serious of the two and thus, submitted Mr. Turnock, should have acquitted on the other as the offence of assault occasioning actual bodily harm embraces common assault and assault on police.

4 Miss Khubchand's submissions were twofold: (i) the assault on a police officer was the main charge and in her view it was not open to the Stipendiary Magistrate to convict on both; and (ii) where alternative charges are preferred by the prosecution, the court ought not to convict on both—it is one or the other but not both.

5 In my view, it is clear that the Stipendiary Magistrate considered that the assault on a police officer was the more serious offence of the two charges on trial before him. His sentences show that. He sentenced the appellant to 10 weeks' imprisonment for assault on a police officer and no separate penalty for assault occasioning actual bodily harm. But is Mr. Turnock right in his submission that the charge of assault occasioning actual bodily harm is subsumed under the more serious charge of assault on a police officer?

6 In the magistrates' court, both charges carry the same maximum sentence, *i.e.* the learned Stipendiary could impose six months' imprisonment, but the charges as statutorily set out in the Criminal Offences Ordinance are not the same. Assault on a police officer is only a summary offence with a maximum of six months' imprisonment. Assault occasioning actual bodily harm is an indictable offence with a maximum of five years. Even common assault has a maximum of one year on indictment but only two months on summary conviction. It seems to me that the charge of assault occasioning actual bodily harm is the more serious offence of (a) and (b). The situation in England is somewhat different, but that does not concern me.

7 I can readily understand why in the magistrates' court the learned Stipendiary should choose to sentence on the assault on a police officer charge rather than the other. He has a duty to protect the police and the

learned Stipendiary in the present matter chose to sentence in what before him was a more serious event in the circumstances, but that does not necessary imply that he could not, as a matter of law, also convict on the charge of assault occasioning actual bodily harm. My attention was drawn to *R.* v. *Harris* (2), where a conviction of indecent assault was quashed as it was held to merge into the conviction of a graver charge, namely buggery. I quite agree with the proposition there expounded ([1969] 1 W.L.R. at 746) that—

> "it does not seem to this court right or desirable that one and the same incident should be made the subject-matter of distinct charges, so that hereafter it may appear to those not familiar with the circumstances that two entirely separate offences were committed."

But note what was said thereafter (*ibid.*, at 746): "Were this permitted generally, a single offence could frequently give rise to a multiplicity of charges and great unfairness could ensue."

8 In the present case, while the two charges present many of the facts in common they are fairly distinct. I cannot accept Mr. Turnock's contention that the charge of assault occasioning actual bodily harm can be subsumed into the charge of assault on police, (a) because they are different; and (b) because assault occasioning actual bodily harm is the more serious.

9 However, the conviction of assault occasioning actual bodily harm must be quashed. The charges were preferred in the alternative. The Stipendiary should have dealt with them accordingly. Having convicted on one, he should have dismissed the other. That choice would depend on the Stipendiary's view of which was the more serious, and his appraisal of the relative gravity of the two offences, as proved to him, leaves no doubt but that, out of the two, it is proper to quash the charge of assault occasioning actual body harm.

10 I allow the appeal and set aside the conviction of the appellant in respect of the charge of assault occasioning actual bodily harm and so order.

Appeal allowed.